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Nos. 73-1377 and 73-1378

In the Supreme Court of the United States

OCTOBER TERM, 1974

RUSSELL E. TRAIN, ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, PETITIONER

v.

THE CITY OF NEW YORK ON BEHALF OF ITSELF AND ALL OTHER SIMILARLY SITUATED MUNICIPALITIES WITHIN THE STATE OF NEW YORK, ET AL.

RUSSELL E. TRAIN, ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, PETITIONER

v.

CAMPAIGN CLEAN WATER, INC.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE DISTRICT OF COLUMBIA AND THE FOURTH CIRCUITS

SUPPLEMENTAL BRIEF FOR THE PETITIONER

ROBERT H. BORK,
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CARLA A. HILLS,
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The Congressional Budget and Impoundment Control Act of 1974, Pub. L. 93-344, 88 Stat. 297, was signed into law subsequent to the filing of our main brief in these cases. Title X of that Act—the Impoundment Control Act of 1974—became effective on

July 12, 1974, the date of enactment. Section 905(a), Pub. L. 93–344, 88 Stat. 331.

The purpose of this supplemental brief is to describe the essential features of the Impoundment Control Act and to discuss its possible bearing upon this litigation.

I

THE IMPOUNDMENT CONTROL ACT

The Congressional Budget and Impoundment Control Act was designed to facilitate the effective participation of Congress in the federal budgetary process. See Section 2, Pub. L. 93–344, 88 Stat. 298. To this end, the Act, in the first nine titles, makes a number of changes in the manner in which Congress makes periodic, relatively long-term, decisions concerning the level of federal expenditures, *e.g.*, Sections 300–311, Pub. L. 93–344, 88 Stat. 306–316, and, in Title X, establishes a new procedure designed to enable Congress to participate in those interim decisions, made by the President, which are required to adjust federal spending to rapidly changing economic conditions. Sections 1001–1017, Pub. L. 93–344, 88 Stat. 332–339.

The new procedures contained in Title X provide for Congressional expressions of approval or disapproval, depending upon the nature of the decision, of Presidential decisions affecting federal expenditures. If the President determines "that all or part of any budget authority will not be required to carry out the full objectives or scope of programs for which it is provided or that such budget authority should be rescinded for fiscal policy or other reasons" (Section

1012(a), Pub. L. 93–344, 88 Stat. 333–334), he is required to submit a special message to Congress specifying the amount of budget authority to be rescinded, the reason for the rescission, the estimated fiscal, economic and budgetary effect of the proposed rescission, all reasons for the decision to rescind, and the estimated impact of the rescission upon the particular program involved (*ibid.*). If, within 45 days (Section 1011(5), Pub. L. 93–344, 88 Stat. 333), Congress does not approve the rescission, the President is directed to make the amount of budget authority which he proposed to rescind available for obligation (Section 1012 (b), Pub. L. 93–344, 88 Stat. 334).

In contrast to the requirement of an expression of Congressional approval of a proposed rescission, the Act provides for an expression of disapproval by one House of Congress with respect to other types of Presidential decisions concerning expenditures. Thus, whenever the President decides to withhold or delay the obligation or expenditure of budget authority, but not to rescind such authority (Section 1011(1), 1013 (c), Pub. L. 93–344, 88 Stat. 333, 335), he is required to submit a special message to Congress containing the same type of information contained in a rescission message (Section 1013(a), Pub. L. 93–344, 88 Stat. 334). If either House of Congress adopts an impoundment resolution (as defined in Section 1011(4), Pub. L. 93–344, 88 Stat. 333) disapproving the proposed deferral, the amount of budget authority which the President proposed to defer is to be made available for obligation (Section 1013(b), Pub. L. 93–344, 88 Stat. 335).

The Act further provides that if the President fails to submit a rescission or deferral message, the appropriate message is to be submitted by the Comptroller General (Section 1015(a), Pub. L. 93-344, 88 Stat. 336). If the President fails to make budgetary authority available as the Act requires, the Comptroller General is empowered to institute a civil suit in the United States District Court for the District of Columbia to require the President to make the authority available (Section 1016, Pub. L. 93-344, 88 Stat. 336-337).

II

THE IMPOUNDMENT CONTROL ACT DOES NOT AFFECT THIS LITIGATION

As discussed in our main brief, the issues presented in these cases are whether the Water Pollution Control Act Amendments of 1972 authorize the Administrator of the Environmental Protection Agency, acting at the direction of the President, to control the rate of spending under the program by alloting less than the full amounts authorized by Congress, and whether, if, as we submit, such authority exists, the Administrator's exercise of that discretion is subject to judicial control. As we shall show, the Impoundment Control Act of 1974 does not affect either of these issues.

For purposes of the Impoundment Control Act, the Administrator's action challenged in these cases constitutes a "deferral" rather than a "rescission".[1] Since

[1] As our main brief points out (see pp. 26-28), the 1972 Amendments permit the Administrator, if he allots less than the full amounts authorized for specific years, to allot the balance at some future time.

the deferral at issue here occurred prior to the enactment of the Impoundment Control Act, we submit that the Act has no application to these cases. Alternatively, assuming that the Act applies to deferrals which occurred before the date of enactment, the provisions of the Act do not affect the issues presented in these cases in the absence of the adoption of an "impoundment resolution" by one House of Congress under Section 1013(b) of the Act. Since no such action has occurred, the question of its effect is not presently before this Court.

A. SECTION 1001

Our submission as to the applicability of the Impoundment Control Act to these cases is based on a construction of Section 1001 of the Act in light of the relevant legislative history. Section 1001 provides as follows:

> Nothing contained in this Act, or in any amendments made by this Act, shall be construed as—
>
> (1) asserting or conceding the constitutional powers or limitations of either the Congress or the President;
>
> (2) ratifying or approving any impoundment heretofore or hereafter executed or approved by the President or any other Federal officer or employee, except insofar as pursuant to statutory authorization then in effect;
>
> (3) affecting in any way the claims or defenses of any party to litigation concerning any impoundment; or

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> (4) superseding any provision of law which requires the obligation of budget authority or the making of outlays thereunder.

In terms, the Act does not apply to these cases. Section 1001(3) provides that nothing in the Act "shall be construed as * * * affecting in any way the claims or defenses of any party to litigation concerning any impoundment." In other words, Congress left it to the courts to decide all "claims or defenses" in any pending "litigation concerning any impoundment." These cases, in which the "claims" and "defenses" relate to the authority of the Administrator to allot less than the amounts authorized to be appropriated and the scope of judicial review of such administrative action, come squarely within the exception in Section 1001(3).

The legislative history of the Act, which we now discuss, confirms that Congress intended these words to mean what they say.

B. THE LEGISLATIVE HISTORY

Provisions substantially identical to Section 1001 were first considered during hearings before the House Rules Committee on proposed impoundment legislation. Representative Culver, the author of the provisions, explained their purpose as follows:

> * * * Congress may wish to consider withholding a judgment on the practice of impoundment until the Supreme Court has had an opportunity to consider the issue. At the very least, there should be explicit language in any impoundment bill passed by Congress to declare the intent of Congress on this matter.
>
> I invite the committee to review the language I have proposed * * *. [Hearings before the Committee on Rules of the House of Representatives on H.R. 5193 and Related Bills, Require President Notify Congress re Impounding of Funds, 93d Cong., 1st Sess., p. 342.]

Consistent with his explanation of purpose, Representative Culver's proposed language expressly limited the application of subparagraph (3) to litigation concerning pre-Act impoundments.[2]

The Senate proceedings concerning impoundment legislation confirm that Congress intended that the Act not apply to impoundments occurring before the date of enactment. Thus, S. 373, the predecessor of the bill (S. 1541) which represented the Senate's contribution to Title X, contained a section which provided that nothing in the bill should be interpreted as ratifying or approving any impoundment, past or present, unless done pursuant to statutory authority in effect at the time of the impoundment

[2] Representative Culver's proposed language provided as follows:

"Nothing contained in this Act shall be construed as—

"(1) asserting or conceding the constitutional powers or limitations of either the Congress or the President;

"(2) ratifying any impoundment heretofore or hereafter executed or approved by the President, except insofar as pursuant to statutory authorization then in effect;

"(3) affecting in any way the claims or defenses of any party to litigation concerning any impoundment ordered or executed before the date of the enactment of this Act."

These provisions were adopted by the Rules Committee and subsequently appeared as part of H.R. 7130, which the House passed. 119 Cong. Rec. (daily ed., December 5, 1973) H10702.

and a provision which provided that the bill was to become effective upon the date of its enactment. See 119 Cong. Rec. (daily ed., May 10, 1973) S8837.[3] These two provisions were explained by Senator Ervin, the chief sponsor of the bill, as follows [*ibid.*]:

> These sections read together mean that the bill would not apply to funds that are impounded prior to its enactment, but that nothing in the bill is meant to prejudice any of the pending lawsuits which challenge the President's authority to impound.

S. 1541 contained substantially the same provision as S. 373, and Senator Ervin, the chief sponsor of the bill, again expressly stated that "This disclaimer [was] * * * included in order not to prejudice any of the numerous lawsuits now pending * * *." 120 Cong. Rec. (daily ed., March 19, 1974) S3835.

S. 1541 and H.R. 7130, which contained Representative Culver's proposed language, were submitted to conference and formed the basis for Section 1001 of the Act. The conference deleted the limitation of subparagraph (3) to pre-Act impoundments, and the conference version was enacted into law. There is no reference to the deletion in either the conference report (S. Conf. Rep. No. 93-924, 93d Cong., 2d Sess.) or the debates concerning the report (120 Cong. Rec. (daily ed., June 21, 1974) S11221-S11243), and in light of the previous expressions of concern that the

[3] S. 373 was passed by the Senate and sent to conference. The conference failed to report a bill because of a disagreement over matters not material here. See 120 Cong. Rec. (daily ed., March 21, 1974) S4091 (remarks of Senator Muskie).

Act not prejudice pending litigation, the deletion was, we submit, inadvertent.

C. THE IMPOUNDMENT CONTROL ACT DOES NOT APPLY TO IMPOUNDMENTS THAT OCCURRED PRIOR TO THE DATE OF ITS ENACTMENT

The Impoundment Control Act became effective on July 12, 1974, the date of enactment. Section 905(a), Pub. L. 93-344, 88 Stat. 331. Although the Act does not explicitly deal with its applicability to impoundments that occurred prior to the date of enactment, we submit that the Act does not apply to such impoundments.[4]

Our submission is based on Congress' intention, as expressed in the disclaimer provisions of Section 1001 and its accompanying legislative history, that the Act not affect pending litigation (See pp. 5-8, *supra*). Indeed, the exclusion of pre-Act impoundments from the operation of the Act is essential if the disclaimer provisions are to be meaningful.

As shown above, the legislative history of Section 1001(3) makes clear that at a minimum Congress intended that the Act not affect litigation concerning impoundments which was pending as of the enactment of the Act. Thus, if Congress' purpose is to be implemented, the Act does not apply to an impoundment such as that at issue here; otherwise, Congressional action under the Act might affect the claims or defenses in this case.

Moreover, we believe that Congress intended, irrespective of pending litigation, that pre-Act impound-

[4] The Attorney General has so advised the President in an opinion dated October 10, 1974, a copy of which is reprinted as Appendix A to this brief.

ments not be subject to Congressional approval or disapproval. This conclusion reflects the most reasonable construction of Section 1001(2), which provides that nothing in the Act shall be construed as "ratifying or approving any impoundment heretofore or hereafter executed * * * except insofar as pursuant to statutory authorization then in effect."

The Comptroller General has expressed a view contrary to our submission.[8] In concluding that the Act applies to pre-Act impoundments, the Comptroller General relies on two factors: (1) his interpretation of the general purpose of the Act, with particular reference to Section 1001(2), and (2) certain language in the operative provisions of the Act. As shown below, neither of these factors supports the Comptroller's conclusion.

The Comptroller General's conclusion that "* * * the history of the 1974 statute clearly established the Congressional disagreement with the view taken by the executive branch that general authority exists for the deferral (impoundment) of budget authority" is in part incorrect and is in any event not dispositive of the issue here. While there may be no general statutory authority for impoundment, the Act explicitly recognizes that such authority does exist under certain statutes. See Section 1001(2).

The Comptroller General's interpretation of Section 1001(2) is incorrect because he has overlooked

[8] See letter of October 15, 1974 from the Comptroller General to the Speaker of the House of Representatives and the President Pro Tempore of the Senate, a copy of which is reproduced as Appendix B to this brief.

the critical language of the proviso "except insofar as pursuant to the statutory authorization then in effect." Contrary to the Comptroller General's view, our construction of Section 1001(2) does not result in a recognition of general impoundment authority; rather, it merely leaves to the courts the question whether a pre-Act impoundment occurred "pursuant to statutory authorization then in effect."

Finally, the Comptroller General refers to the definition of "deferral of budget authority" in Section 1011(1) of the Act as indicating that Congress viewed impoundment as a continuing act. While the "action or inaction" language of Section 1011(1) is consistent with a continuing act analysis, other provisions of the Act suggest that Congress viewed impoundment as occurring at a fixed point. Thus, Section 1012(a) requires submission of a budget message whenever "the President determines" that recission of budget authority is appropriate. The ambiguity of the operative provisions is dispelled by the disclaimer provisions which treat impoundments as decisions made at a fixed point (*e.g.*, Section 1001(2) refers to impoundments "executed or approved") and which, in any event, indicate that pre-Act impoundments are simply not subject to Congressional action under the Act.

D. EVEN IF APPLICABLE TO PRE-ACT IMPOUNDMENTS, THE IMPOUNDMENT CONTROL ACT DOES NOT AFFECT THESE CASES IN THE ABSENCE OF CONGRESSIONAL ACTION

Even assuming the Act to be applicable to pre-Act impoundments whose validity was in litigation when the Act became effective, its provisions do not affect

the issues presented in these cases unless there has been a Congressional "impoundment resolution." Section 1001 manifests a Congressional neutrality toward the issues presented in impoundment litigation. Thus, if our submission that authority to defer funds exists under the 1972 Water Pollution Control Act Amendments is correct, the Impoundment Control Act does not alter that authority in the absence of Congressional action. Conversely, if such authority does not exist under the 1972 Amendments, it is not granted by the Impoundment Control Act.

Our conclusions concerning the effect of the Act in the absence of Congressional action is derived from a reading of subparagraph (3) in light of subparagraphs (2) and (4) of Section 1001. Subparagraph (2) provides that the Act shall not be construed as a ratification of any impoundment "expect insofar as pursuant to statutory authorization then in effect." As applied to pre-Act impoundments, subparagraph (2) announces that the mere passage of the Act does not alter authority to impound which existed under another statute at the time the impoundment occurred. The Act leaves to the courts the determination whether independent statutory authorization exists.[6]

Subparagraph (4) provides that nothing in the Act shall be construed as "superseding any provision of

[6] If subparagraph (2) is given a literal construction, it would have the effect of confining judicial inquiry to whether statutory authorization exists and the question of reviewability of discretion would be foreclosed. Since we believe that Congress did not intend the Act to affect pending litigation in any manner, subparagraph (2) should not be so read. As we point out in our main brief (pp. 41–48), however, the Administrator's action in these cases is not subject to judicial control.

law which requires the obligation of budget authority or the making of outlays thereunder." Since there are only two possible classes of budget authorization legislation—those Acts requiring mandatory obligation of funds and those according the Executive discretion to rescind or defer budget authority—subparagraph (4) compels the conclusion that if the Executive does not have authority to impound under an independent statute, such authority is not granted by the Impoundment Control Act.[7]

The foregoing analysis of subparagraphs (2) and (4) is consistent with the disclaimer of subparagraph (3) that nothing contained in the Act shall be construed as affecting claims or defenses in litigation. Thus, as noted above, if our submission in these cases—that the 1972 Water Pollution Control Act Amendments authorize the Administrator's action—is correct, that authority is not affected by the Impoundment Control Act in the absence of adoption of an "impoundment resolution." On the other hand, if this Court should determine that such authority was not conferred by the 1972 Amendments, the Impoundment Control Act does not provide an independent basis for the Administrator's action.

[7] Subparagraph (4) was added by the conference committee on H.R. 7130 S. Conf. Rep. No. 93-924, *supra*, at p. 40; H. Conf. Rep. No. 93-1101, 93d Cong., 2d Sess., p. 40). The subparagraph was explained by Senator Ervin as designed to disavow (120 Cong. Rec. (daily ed., June 21, 1974) S11222):

"* * * any intention by Congress to supersede any law which requires the mandatory obligation of budget authority, since several such statutes have been enacted in response to the wholesale impoundment of funds appropriated for specific programs." When the confeernce report on H.R. 7130 was considered by

Since the Act does not affect the substantive issues presented in these cases, the Act could affect these cases only upon the adoption by one House of Congress of an "impoundment resolution" disapproving the Administrator's action.[8] No such action has been taken with respect to the deferrals in issue in these cases: thus, questions concerning its effect are not presently before the Court.

Respectfully submitted.

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the Senate, Senators Ervin and Humphrey stated that the bill "delegated" authority to the President to defer funds for the fiscal year for which he submits a deferral message as long as neither House of Congress expressed its disapproval. 120 Cong. Rec. (daily ed., June 21, 1974) S11222 (Remarks of Senator Ervin); 120 Cong. Rec. (daily ed., June 21, 1974) S11238 (Remarks of Senator Humphrey). These statements were unsupported and are contrary to the express terms of Section 1001 and its legislative history.

[8] Although a deferral message concerning the deferrals at issue in these cases was submitted to Congress by the President on September 20, 1974 (120 Cong. Rec. (daily ed., September 23, 1974) S17195), the President explicitely stated that the message was solely for purposes of information since he had been advised by the Attorney General that the Act did not apply to pre-Act poundments (*Id.*) In any event, the mere submission of a deferral message does not affect the Administrator's action. Amounts deferred are not required to be made available for obligation until the adoption of an impoundment resolution under Section 1013(b), Pub. L. 93-344, 88 Stat. 335.

APPENDIX A

OCTOBER 10, 1974.

THE PRESIDENT
The White House

DEAR MR. PRESIDENT: This is in response to your request for a written expression of the views I have previously conveyed concerning the applicability of the Impoundment Control Act of 1974 to budget authority enacted, and impoundments effected, prior to July 12, 1974, the date the Act was signed by the President. The immediate question is whether the Act's requirements of submission by the President of special messages to Congress are applicable to pre-Act impoundments and to post-Act impoundments of pre-Act budget authority. In my view, those requirements are applicable to the latter but not to the former.

The first step in analysis is to determine the effective date of the Act's provisions. Of course, most legislation is effective upon its signing, and that is the ordinary presumption, absent indication of a contrary legislative intent. The Impoundment Control Act is one part, Title X, of the Congressional Budget and Impoundment Control Act of 1974, Public Law 93-344. The remaining titles, I-IX, comprise the Congressional Budget Act. Although the Impoundment Control Act does not contain an effective-date provision, the Congressional Budget Act does (sec. 905). This provides that the new Congressional budget procedures are to take effect on a staggered basis: the first fiscal year to which they are all to be applicable is the year beginning October 1, 1976. It might be argued, because of the clear relationship

between the new Congressional budget procedures and the new impoundment controls, that the latter are not to take effect until October 1, 1976. However, neither the legislative history nor the logic of the matter justifies this result. When the House of Representatives was considering its version of the bill, an amendment to postpone the effectiveness of the impoundment-control provisions so as to "synchronize" them with the Congressional-budget provisions was expressly rejected. See 119 Cong. Rec. H 10707–8 (daily ed., Dec. 5, 1973). It cannot be assumed that the conference report, without any mention of the matter, intended to reverse this determination. Moreover, despite the functional connection between the new impoundment controls and Congress' new budget procedures, it is entirely feasible to implement the impoundment-control provisions independently. Accordingly, it must be assumed, in accordance with the normal rule, that the Impoundment Control Act was effective upon its signing.

The next issue, then, is how the terms of the Act apply to previously enacted budget authority. I find nothing whatever to indicate that this was intended to occupy a special status. The basic provisions of the Act and its definitions are broad in nature, and they make no distinction between pre-Act and post-Act budget authority. See sec. 1012 (rescission of budget authority) and sec. 1013 (deferral of budget authority). See also the definitions in sec. 3(a)(1)–(2) and sec. 1011(1). It is conceivable that pre-Act budget authority is distinctive for purposes relating to some constitutional aspects of the legislation (a point about which you have not inquired, and on which I express no opinion). But insofar as the terms of the legislation are concerned, there is no basis for treating it differently. It is my opinion that all impoundments

made after July 12, 1974, regardless of whether they relate to budget authority enacted before or after that date, are subject to the terms of the new legislation, including the provision for transmittal of special messages to the Congress.

There remains for consideration the issue of the Impoundment Control Act's applicability to impoundments made before its effective date. In my view, these are not covered. The provisions of the legislation are obviously prospective, intended to apply only to events occurring after its effective date. But this does not conclude the matter, since impoundment may be regarded either as a decision made at a fixed point in time or (less commonly, perhaps, but none the less accurately) as a continuing refusal to dispense funds. If the Act regards it in the former fashion, pre-Act impoundments cannot be covered; if in the latter, they can be, since the withholding of funds is still continuing.

Some of the critical language of the legislation (e.g., the word "determines" in sec. 1012(a)) is simply not consistent with the "continuing act" view, but some of it (notably, the phrase "is to be reserved" in sec. 1012(a)) is. On balance—assuming, as seems necessary, that all pre-Act impoundments are meant to be treated alike—it seems easier to square the "continuing act" language with an interpretation that renders the legislation inapplicable to pre-Act impoundments, than the "single act" language with an interpretation that renders it applicable. That is to say, it is possible to read language which considers impoundment a "continuing act" as applying only to continuing acts that commence after enactment, whereas it is difficult to conceive of any reasonable theory which would apply a phrase like "whenever the President determines" (sec. 1012(a)) to determinations made before the Act was passed.

It must be acknowledged, however, that the language of the operative sections is ambiguous, and in my opinion the decisive factor is the guidance that can be derived from the first section of the Act, sec. 1001. This bears the title "Disclaimer," and like most such provisions it is intended not to have any independent operative effect but to clarify what the other provisions of the act are meant to achieve. Section 1001(3) provides that "[n]othing contained in this Act, or in any amendments made by this Act, shall be construed as—(3) affecting in any way the claims or defenses of any party to litigation concerning any impoundment." As far as I am aware, all litigation which exists or is likely to arise with respect to pre-Act impoundments seeks merely to terminate the continued withholding of funds; and the Government's defense is simply that the continued withholding is lawful. Thus, a lawful past impoundment of the type described in sec. 1012(a) now in litigation can, at the very least, not be considered subject to the Congressional approval requirement of the Act, or else—with no further action on the part of either the President or the Congress, and by virtue of the Act alone—the outcome of the litigation would be reversed and the Government's defense eliminated. It is impossible to give any meaningful content to the portion of section 1001(3) preserving existing defenses unless a past impoundment already in litigation at the date of the Act was not intended to be subject to the Congressional approval provisions.

Having reached this conclusion with respect to sec. 1001(3), I then direct attention to sec. 1001(2), which provides that "[n]othing contained in this Act, or in any amendments made by this Act, shall be construed as—(2) ratifying or approving any impoundment *heretofore or hereafter* executed or approved

by the President or any other federal officer or employee, *except insofar as pursuant to statutory authorization then in effect*" (emphasis added). Even without the benefit of subsection (3), it seems to me that this provision is most reasonably interpreted as expressing the assumption that valid prior impoundments will not be subject to the Congressional approval requirements of the Act; but with the existence of subsection (3) this interpretation seems almost inevitable. Otherwise there would be created a situation in which, by virtue of subsection (3), impoundments already challenged in court would be insulated from the Congressional approval process, whereas impoundments which have provoked no legal protest would not—an absurd result.

Standing by themselves, subsections 1001 (2) and (3) only require the conclusion that past impoundments are exempt from the Congressional approval process, and not that they escape the reporting requirements of sections 1012 and 1013. As noted above, however, section 1001 is not meant to have any independent effect, but only to explain and clarify the other provisions of this legislation. I cannot see how any interpretation of those other provisions could exempt prior impoundments from the Congressional approval requirement without also removing them from the reporting provisions of the Act. In short, it seems to me that section 1001 requires the conclusion that all the provisions of the Act—the reporting requirements as well as the Congressional approval provisions—are meant to reach only impoundments which are made (or if the "continuing act" view is applicable, withholdings which commence) after its effective date.

I must acknowledge that this last conclusion has the untidy effect of leaving an almost imperceptible gap

in the impoundment reporting provisions formerly contained in section 203 of the Budget and Accounting Procedures Act of 1950 and replaced by the reporting provisions of the present legislation (see sec. 1003). The past impoundments would no longer have to be reported under the repealed statute and would not fall within the new legislation. Because it seems to me this gap was inadvertent I think it would be advisable, in the interest of keeping Congress fully informed, to report continuing past impoundments in the future even though such reporting is not required.

Respectfully,

_____,
Attorney General.

APPENDIX B

COMPTROLLER GENERAL OF THE UNITED STATES,
Washington, D.C., October 21, 1974.

The HONORABLE ATTORNEY GENERAL.

DEAR MR. ATTORNEY GENERAL: Enclosed for your information is a copy of my letter to the Speaker of the House and President pro tempore of the Senate transmitting our comments on the special messages sent to the Congress by the President of the United States on September 20, 1974 pursuant to the Impoundment Control Act of 1974.

You will note that we have not reached any legal conclusion as to the authority for the proposed deferrals. Our conclusions on this point will be furnished to you when the matter is decided.

Sincerely yours,

ELMER B. STAATS,
Comptroller General
of the United States.

Enclosure.

COMPTROLLER GENERAL OF THE UNITED STATES,
Washington, D.C., October 15, 1974.

SPEAKER OF THE HOUSE
PRESIDENT PRO TEMPORE OF THE SENATE

On September 20, 1974, we were furnished copies of the first twenty special messages sent to the Congress by the President of the United States pursuant to the Impoundment Control Act of 1974. The rescissions and deferrals of budget authority proposed in these messages total $20.3 billion of which $19.8 billion are proposed deferrals.

Section 1012(a)5 requires that each special message covering a proposed rescission of budget authority shall specify all facts, circumstances, and considerations relating to or bearing on the proposed rescission upon the objectives, purposes, and programs for which the budget authority is provided. A comparable provision in section 1013 deals with proposed deferrals.

Under the Act, we are required to review each message and report promptly to the House and Senate as to the facts surrounding each proposal, including the probable effect thereof and, in the case of proposed deferrals, to render a judgment as to whether the proposal is in accordance with existing legal authority. We are also required to report to the Congress if we find the President has failed to transmit a special message when required or if a message so transmitted has been misclassified.

With respect to the proposed deferrals covered by this report a determination as to whether they are in accordance with existing statutory authority is dependent on the resolution of complex and difficult legal questions concerning the interpretation of the Act. Our legal analysis is not yet complete, so our conclusion as to the legal authority for the proposed deferrals will be transmitted to Congress at a later date.

Our reviews of the special messages are also concerned with assessing whether they contain sufficient relevant, factual data about fiscal, budget and program effects to permit the Congress to understand the action proposed and be helpful to it in judging the desirability of the proposal. The data contained in the messages themselves should meet reasonable standards of completeness but they are only one of the data sources available to the Congress when it is considering the proposed action. In our opinion, congressional

hearings on large and controversial proposals will be essential to fully develop the facts.

The individual messages transmitted with the President's September 20, 1974 letter are an improvement over comparable reports submitted under prior requirements and obviously reflect attempts at better communication of the reasons underlying the proposed actions. They are, however, generally deficient in three important areas:

1. The proposed deferrals, generally, provide either no information on related fiscal impacts or only a brief one or two sentence statement without providing supporting data that there is no impact. We believe that, as a minimum, data on the estimated dollar amount of Federal obligations and outlays, by quarter for fiscal years 1975 and 1976, displayed with and without the effects of the proposed deferral of budget authority, will be necessary in assessing the proposed action. Furnishing this data will require some assumptions as to when the funds will be released but we believe these assumptions can be made with a fair degree of accuracy. In addition, although it can generally be developed from the account symbols shown, the messages do not indicate the type of funds proposed for deferral (annual, multi-year, or no-year appropriations).

2. There is a lack of sufficient data covering the extent to which the achievement of program objectives is affected.

3. In those cases where the action proposed is justified on the ground that the affected activities are being carried out through other programs, there is insufficient data given as to the other funds and as to whether their use for these activities affects their availability for other purposes.

This type of information is essential to permit the Congress to meaningfully review the proposals in the time provided by the Act.

We have discussed these insufficiencies with staff members of the Office of Management and Budget and communicated our concerns to its Director by letter, a copy of which is enclosed. (Enclosure I)

We believe that time constraints make it desirable to proceed with necessary action on the basis of the messages submitted, notwithstanding these deficiencies. We believe, however, that Administration officials should be prepared to furnish additional data to the Congress on request for those messages already transmitted and to take steps to insure that subsequent messages contain more complete treatment of the areas mentioned.

Our review and analysis of the facts surrounding the proposed rescissions and deferrals transmitted to the Congress on September 20, 1974, and our appraisals of the adequacy of the treatment given the probable effects of the proposed actions are presented in Enclosure II. Some of the deferral actions proposed by the President involve large programs and very substantial sums of money. While our review of deferrals indicates that there will be an opportunity to expend the funds in each case, we recognize that judgment could reasonably differ on this point. We construe the intent of the Congress to be that, if funds cannot effectively be expended because of deferrals, a rescission of all or part of the funds should be sought. We therefore call the Congress' attention to the deferrals listed below with respect to which inability to expend the funds effectively is a possibility.

D75–9—Environmental Protection Ageney—Water Program Operations Construction Grants

D75–17—Department of Transportation, Federal Highway Administration Federal-aid Highways

Section 1013(a) requires the President to transmit a special message on any deferral of budget authority. Included with the President's September 20, 1974 letter are deferrals that represent a generally noncontroversial class of routine delays that can be expected to occur from internal management actions which phase or delay obligations for reasons related to achieving efficiency and economy in the operation of a program or project (e.g., D75–1, 10, 11, 12, 13, 14, 15, 16, and 18). If presidential messages are desired on these types of delays, the Congress should expect to receive a substantial volume of deferral messages in which congressional interest is likely to be small.

The Attorney General has determined that this Act applies only to determinations to withhold budget authority which have been made since the law was approved. The following statements from the President's September 20, message, however, recognize that reasonable men may differ on this point and that further guidance from the Congress would be helpful.

"Reasonable men frequently differ on interpretation of law. The law to which this message pertains is no exception. It is particularly important that the executive and legislative branches develop a common understanding as to its operation. Such an understanding is both in keeping with the spirit of partnership implicit in the law and essential for its effective use. As we begin management of the Federal budget under this new statute, I would appreciate further guidance from the Congress. The added information on the status of funds not subject to congressional action is being made available with this in mind. It will also permit a better understanding of

the status of some funds reported previously under the earlier impoundment law."

"Virtually all of the actions included in this report were anticipated in the 1975 budget, and six of them were taken before July 12, when the new procedures came into effect. Failure to take these actions would cause more than $20 billion of additional funds to become available for obligation. The immediate release of these funds would raise Federal spending by nearly $600 million in the current fiscal year. More significantly, outlays would rise by over $2 billion in 1976 and even more in 1977, the first year in which the new procedures for congressional review of the budget will be in full effect."

We have requested but have not been furnished a copy of the Attorney General's opinion and therefore have not had the benefit of the reasoning supporting his conclusion.

In our view, the Impoundment Control Act of 1974 applies to deferrals of budget authority made prior to the date of the statute's enactment—July 12, 1974—as the history of the 1974 statute clearly established the congressional disagreement with the view taken by the executive branch that general authority exists for the deferral (impoundment) of budget authority. With this in mind, the Congress developed the disclaimer provisions of § 1001. In particular, § 1001(2) states that passage of the Act in no way approves or ratifies impoundments undertaken prior to July 12, 1974. To argue that the Act does not apply to any such actions is antithetical to the language of § 1001(2) because such a construction of the Act would result in implicit recognition of such authority. This clearly was not the congressional intent in passing the Act.

Furthermore, the definition of "deferral of budget authority" § 1011(1), *supra,* also is inconsistent with

the executive branch's interpretation. The definition by using the phrase, "Executive action or inaction" clearly is applicable to those presidential determinations not to apportion, obligate, or make available for obligation budget authority which were made prior to July 12, 1974. In our view, "inaction" is not limited to one-time measures, but rather is of a continuing nature. Accordingly, executive "inaction" to make funds available for obligation prior to the date of the statute would continue after July 12, 1974.

Sincerely yours,

(Signed) ELMER B. STAATS,
Comptroller General of the United States.

Enclosures.

Enclosure 1

COMPTROLLER GENERAL
OF THE UNITED STATES,
Washington, D.C., October 15, 1974.

Hon. ROY L. ASH,
Director, Office of Management and Budget

DEAR MR. ASH: We have examined the first twenty special messages sent to the Congress by the President of the United States on September 20, 1974, pursuant to the Impoundment Control Act of 1974. A copy of our report to the Congress is enclosed.

Our review of the special messages was concerned primarily with assessing whether they contain sufficient relevant, factual data about fiscal, budget, and program effects to alert the Congress to the possibility of the existence of a problem. In our opinion, the data contained in the messages themselves should meet reasonable standards of completeness, but we recognize they are only one of the data sources available to the Congress when it is considering the proposed action. In our opinion, congressional hearings

are essential on large and controversial proposals to fully develop the facts.

As you will note, we have concluded that while the messages transmitted are a substantial improvement over prior reports and obviously reflect efforts at better communication of the reasons underlying the proposed actions, they are deficient in three areas essential to permit the Congress to meaningfully review the proposals in the timeframe available.

We are working with your staff to make the special messages more informative. We believe that there is a need for providing Congress with more complete data on fiscal, budget, and program effects of rescissions and deferrals.

Your particular attention is invited to the fact that we have not reached any legal conclusions as to the authority for the proposed deferrals. Our conclusion on this point will be furnished to the Congress at a later date.

Sincerely yours,

(Signed) ELMER B. STAATS,
Comptroller General of the United States.

Enclosure.

Enclosure II

COMMENTS ON SPECIAL MESSAGES TRANSMITTED BY THE PRESIDENT SEPTEMBER 20, 1974 PURSUANT TO IMPOUNDMENT CONTROL ACT OF 1974

R75–1 *Appalachian Regional Commission, Airport Safety Improvements*

We have confirmed that the cited FAA programs are available for and are being used to accomplish the types of airport safety activities provided for in the contract authority proposed for rescission.

Information as to how the FAA program funds are being used and to what extent this use for Appalachian Regional Development Programs will reduce the monies available for other purposes is not provided but is essential to an understanding of the effect of this proposed action.

R75–2 *Department of Agriculture, Rural Electrification Administration Loans*

We have confirmed the facts as stated in the justification and believe that the information provided is adequate for the Congress to respond to the proposed rescission.

D75–1 *Department of Defense, Corps of Engineers—Civil; Construction, General*

We have confirmed that $108,000 has been placed in reserve pending the completion of a new study of the environmental impact of the project. The study is scheduled to be completed in November 1974.

The message contains no information as to the effects of the proposed deferral upon the objects, purposes, and programs for which the budget authority is provided.

Department of Health, Education and Welfare, Education Division: Office of Education

D75–2 *Library Resources (Public Libraries)*
D75–3 *Higher Education (University Community Services)*
D75–4 *Higher Education (Land Grant Colleges)*
D75–5 *Higher Education (State Postsecondary Education Commissions)*
D75–6 *School Assistance in Federally Affected Areas (Payments for "B" Children)*

Department of Health, Education and Welfare, Social Rehabilitation Service

D75–7 *Rehabilitation Services (Innovation and Expansion)*
D75–8 *Public Assistance (Child Welfare Services)*

We confirmed that the factual data presented in the above messages is essentially correct. Funds are proposed to be withheld from these programs which are operating under a continuing resolution. The proposed deferrals apply only to the first quarter of 1975 spending and no decision has been made concerning later periods.

The statements of estimated effects, for the most part, are merely restatements of the proposed deferrals and give very little data by which the Congress can examine the fiscal, budget, or program effect on program operations that may result from the deferrals.

D75–9 *Environmental Protection Agency, Abatement and Control (Construction Grants)*

This deferral message comments to some degree on the fiscal and budget effects of this deferral and on the investment by others for pollution abatement, but it does not contain sufficient data on these matters or on the estimated effect of the deferral upon the objects, purposes, and programs for which the budget authority is provided to permit Congress to understand the action proposed and judge the desirability of the proposal.

No data is supplied about the pace at which abatement is being achieved, the backlog of projects, the ability of States and localities to meet Federal goals and standards, or the effect of inflation on construction costs. Congress needs more information on the status of the program and the impact of this proposal upon it. Specifically, to properly evaluate this proposal, Congress needs at least the following data:

1. The estimated dollar amount of Federal obligations and outlays for all EPA water program operations, construction grants, by quarter for FY 1975 and 1976, under the proposed deferral of budget authority.

2. The estimated dollar amount of Federal obligations and outlays, described in (1) above, by quarter for FY 1975 and 1976, in absence of the proposed deferral of budget authority.

3. The projected effect on program goals and timetables for achieving water quality standards of the proposed deferrals in the States and regions which would be affected by the proposed deferrals.

D75–10 *General Services Administration, Automatic Data Processing Fund*

The facts presented are essentially correct except the "balance for requirements in subsequent years of $37.5M" is a subtraction error. The correct amount is $39.6M.

The $4.3 million proposed deferral was released subsequent to the transmission of the special message. The $14,000,000 is being reserved until future savings opportunities become available. OMB staff, however, stated that the 14M was not supported by a detailed listing of potential or probable future purchases and that GSA's budget for capital purchases was being restricted to the $6M level. They said the $14M was an estimate based on historical expenditures and its deferral anticipates greater use of long-term leasing.

D75–11 *U.S. Department of Agriculture, Agriculture Research Service (Construction)*

We have confirmed that the $770,000 proposed for deferral is being reserved pending reexamination into the possibility of satisfying requirements from existing facilities.

D75–12 *Department of Commerce, National Oceanic and Atmospheric Administration, Fisheries Loan Fund*

This deferral of $4,039,000 is proposed pending the National Oceanic and Atmospheric Administration's seeking legislative clarification of the Act prompted by a General Accounting Office report.

D75–13 *Department of the Interior,*
Bureau of Land Management,
Oregon and California Grant Loans

We have confirmed that the facts surrounding the proposed deferral are essentially accurate. The need to defer $18,450,000 of the $23,693,000 is caused by an unanticipated increase in timber revenue.

The funds involved are derived from the sales of sawtimber, the amount of which cannot be accurately predicted.

D75–14 *Department of the Interior,*
Bureau of Reclamation,
Construction and Rehabilitation

We have confirmed that $1,055,000 of funds with which to begin the construction of the billion dollar second Bacon Siphon and Tunnel irrigation project has been proposed for deferral pending the outcome of a study of economic feasibility of the project ordered by the Administration and a study of the possible alternatives to the present design suggested by the Senate.

This message contains no information as to the effects of the proposed deferral upon the objects, purposes, and programs for which the budget authority is provided.

D75–15 *Department of the Interior,*
Bureau of Reclamation,
Upper Colorado River Basin Fund

We have confirmed that construction funds of $1,150,000 are proposed for deferral pending the outcome of a study of salinity effects and possible redesign of the project. The studies are scheduled for completion in January 1975.

The message contains no information as to the effects of the proposed deferral upon the objects, purposes, and programs for which the budget authority is provided.

D75–16 *Department of State,*
International Center,
Washington, D.C.

We confirmed with Department officials that a $500,000 deferral was necessary because the General Services Administration work performance schedule for the project was such that the entire amount could not be obligated during fiscal year 1975. The officials indicated that the deferred amount of $500,000 was needed for the program and would probably be expended in fiscal year 1976. Department officials additionally explained that work could not be started until the project's environmental impact statement is approved. The statement is expected to be completed in November 1974.

D75–17 *Department of Transportation (DOT),*
Federal Highway Administration,
Federal-Aid Highways,
1975 and prior programs, 1976 program

The $10.7 billion proposed for deferral of Federal-aid Highway obligation authority represents the difference between $15.3 billion total budgetary resources available and $4.6 billion in FY 1975 obligation authority for the States. The total budgetary resources includes unobligated balances brought forward from fiscal years 1973, 1974, and 1975 and the new budget authority for FY 1976 because highway legislation

permits the obligations of funds 6 months before the fiscal year begins.

The Office of Management and Budget and its predecessor BOB have limited obligational authority for Federal-aid highway programs for many years and the $10.7 billion deferral in this message is a consequence of these actions.

The highway program level for the past 6 years has averaged about $4.7 billion a year. Assuming a similar program level for FY's 1976 and 1977, the release in those years of the obligation authority deferred by this message will provide sufficient funding for the highway program without any new budget authority prior to the expiration of the highway trust fund in October 1977.

Officials of OMB and DOT were unable to provide evidence on the estimated effects of the deferral. They said that their projections were rough estimates of anticipated impact and are not supported by detailed schedules.

There is sufficient information presented for Congress to evaluate the impact of the proposed deferral. Congress needs at least the following data:

1. The estimated dollar amount of Federal obligations and outlays for all DOT Federal Highway Administration, Federal-aid Highways, by quarter for FY 1975 and 1976, under the proposed deferral of budget authority.

2. The estimated dollar amount of Federal obligations and outlays described in (1) above, by quarter for FY 1975 and 1976, in the absence of the proposed deferral of budget authority.

3. The probable effects of the proposed deferral on program goals and objectives for highway construction in the States and regions which would be affected by the proposed deferrals.

D75-18 *Other Independent Agencies, Foreign Claims Settlement Commission, Payment of Vietnam Prisoners of War Claims*

We confirmed with Commission officials that the deferral of $10.5 million was necessary to assure that funds would be available at future dates to pay prisoners of war claims. The Department of Defense is currently in the process of determining whether individuals listed as missing in action were ever actually prisoners of war. Until this classification process is completed, the Commission is unable to determine the exact amount of claims which will be payable.

U.S. GOVERNMENT PRINTING OFFICE: 1974